TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted].108

NEW YORK STATE RAILWAYS, PLAINTIFF IN ERROR,

vs.

N. MONROE MARSHALL, AS TREASURER OF THE STATE OF NEW YORK; JOHN D. HIGGINS, RICHARD H. CURRAN, ET AL., &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 7, 1922.

(29,086)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 536.

NEW YORK STATE RAILWAYS, PLAINTIFF IN ERROR,

vs.

N. MONROE MARSHALL, AS TREASURER OF THE STATE OF NEW YORK; JOHN D. HIGGINS, RICHARD H. CURRAN, ET AL., &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1922.

a STATE OF NEW YORK:

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Ablany, on the 31st day of May in the year of our Lord one thousand nine hundred and twenty-two, before Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Remittitur June 1, 1922.

In the Matter of the Claim of J. J. McNAMARA, for Compensation, &c.

Be it remembered, That on the 24th day of May in the year of our Lord one thousand nine hundred and twenty-two New York State Railways, Employer &c., the appellant in this cause, came here into the Court of Appeals, by William H. Foster, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Board, the respondent in said cause, afterwards appeared in said Court of Appeals by Charles D. Newton, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert E. Whalen of counsel for the appellant, and no appearance having been made by counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed
b from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said order be affirmed with costs.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, Third Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, June 1, 1922.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[L. S.] R. M. BARBER,
Clerk.

1 Court of Appeals, State of New York.

Before the State Industrial Board, Respondent.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen' Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

Statement under Rule 234.

This is an appeal from an order of the Supreme Court, Appellate Division, Third Department, entered in the office of the Clerk of the Appellate Division, Third Department, affirming an award and decision of the State Industrial Board, awarding to the State Treasurer the sum of $900 pursuant to Section 15, Subdivision 8 of the Workmen's Compensation Law. Proceedings were commenced by filing with the Industrial Commissioner, Employee's Claim for compensation, dated April 11, 1921. There has been no change of parties or attorneys since the commencement of this proceeding except that William H. Foster has been substituted in place of Gannon, Spencer & Michell as attorney for appellants.

2 *Notice of Appeal.*

Supreme Court, Appellate Division, Third Department.

Before the State Industrial Commission, Respondent.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen' Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

SIRS:

Please take notice that New York State Railways, Employer and Self-Insurer, hereby appeal to the Appellate Division of the Supreme Court, Third Department, from award and decision of the State Industrial Commission made and entered in the office of said Commission on the 31st day of December, 1921, and from such part of said award as awards $900.00 to the State under Section 15, Subdivision 8, of the Workmen's Compensation Law.

Dated, Syracuse, N. Y., Jan. 24, 1922.

Yours, etc.,

GANNON, SPENCER & MICHELL,
Attorneys for Appellants.

Office and Postoffice Address,
917 O. C. S. Bank Bldg.,
Syracuse, N. Y.

3 To:

Joseph H. Hollands, Esq.,
Clerk, Appellate Division,
Third Department, Albany, N. Y.
Hon. Chas. D. Newton, Attorney General,
The Capitol, Albany, N. Y.
Frank P. McNamara,
20 Elizabeth St.,
Oneida, N. Y.

Notice of Award in Death Cases in Which There Are No Persons Entitled to Compensation.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.
New York Office: 230 Fifth Avenue.
Copied 1/24/22.
Dated 1/5/22.
Case No. 604,338-2 N. Y.
Case of J. J. McNamara, Deceased.

Stanley L. Otis, Director Bureau Workmen's Comp., 124 East 28th St., N. Y. City:

Employer-carrier is herewith instructed to make check jointly payable to the order of "Treasurer State of New York or The Industrial Commissioner, State of New York," and forward same to the Cashier, Dept. of Labor, 124 East 28th St., N. Y. City.

4 Award is also made to the State of $100 as provided in the Statute, Section 15, Subdivision 7. The objection of the carrier that award in this case under the statute as per Section 15, Subdivision 8, of $900 to the State is illegal, is overruled and award for $900 is also made, making a total of $1,000 to the State as provided by law.

To N. Y. State Rys., Employer, 305 Gridley Bldg., Syracuse, N. Y., and Self-Insured, Insurance Carrier, and A. F. Pentz, Cashier, Dept. of Labor, 124 East 28th St., New York City, and Hon. N. Monroe Marshall, State Treasurer, The Capitol, Albany, N. Y.:

You are hereby notified that at a meeting of the State Industrial Commission held 12/31/21 a decision and order was made in the above case as follows:

$100 for funeral expenses to be paid to Frank P. McNamara, 20 Elizabeth St., Oneida, N. Y.; $100 to be paid to the State Industrial Commission, 230 Fifth Avenue, New York City, to be in turn transmitted to the State Treasurer for the Special Fund created under authority of Numbered Paragraph 7 of Section 15, there being no persons entitled to compensation in this case; and, the employer (and insurance carrier) are hereby ordered and instructed to make payment as aforesaid.

5 The above copy of decision and order is sent to you pursuant to law.

STATE INDUSTRIAL COMMISSION.

Attest:
EDWARD W. BUCKLEY,
Secretary.

Notice of Death.

To the State Workmen's Compensation Commission and to the New York State Railways:

Please Take Notice, That John J. McNamara, a motorman employed by the New York State Railways at Syracuse, N. Y., was accidently killed at Syracuse, N. Y., at the car barn of said company while in the discharge of his duties as an employee of such railway company on or about March 23, 1921. That the best information that can be obtained respecting the cause of the injury to said John J. McNamara is: That he was about to take out his car on a regular run and while preparing to do so in some manner accidentally fell into what is known as the "pit," injuring his head, breaking his shoulder and six ribs, and causing what was known as a cerebral hemorrhage. And the undersigned as brother and administrator of his estate hereby gives notice that a claim for compensation will be made under the Workmen's Compensation Law of this State.

That the address of said John J. McNamara, deceased, at
6 the time of his death and the time the accident occurred, was 105 Anderson Avenue, Syracuse, N. Y.

Dated, April 1, 1921.

FRANK P. McNAMARA.

Form CS-3-6.

Employee's Claim for Compensation.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.
Syracuse Office: 428 South Salina Street.
Division of Claims.
Case No. —. S.
Case of John J. McNamara, deceased, by Frank P. McNamara, Administrator.
Name of injured person: John J. McNamara.
Address: 105 Anderson Ave., Syracuse.
Sex, male. Age, 62. Nationality, American.
Speak English? Yes. Married? No.
Date of accident: March 23, 1921.
Hour of day, 6 A. M.
On what date were you compelled to stop work as result of this injury? Immediately.
Exact location of place where accident happened? Car barns, Syracuse.
Was it at the plant or away from it? At plant.
State occupation when injured? Motorman.
How long have you worked at this occupation? About 30 years.

How long have you worked for present employer? About 30 years.

Were you doing your regular work when injured? Yes?

7 Piece or time worker? Time.

Wages per full day? $5.40.

How did accident happen? Knocked into pit, probably by fender as it was being let down preparatory to going out.

State fully nature of injury? Cerebral hemorrhage and six ribs fractured resulting in death.

Name of employer? New York State Railways.

Office address? Syracuse, N. Y.

Nature of business? Electric trolleys.

Have you returned to work?

If so, when?

If not, when will you be able to return?

Have you received any wages (this does not mean compensation) since the date of your accident?

If you have been paid your wages, to what date?

Will you be able to take up regular employment when you return to work?

If not, why not? Death resulted.

Have you given your employer notice of injury? Yes.

When? Notice mailed.

How? Registered letter by administrator.

Name of attending physician? Ryan, railroad physician.

Address? S. Salina St., Syracuse, N. Y.

If taken to hospital, give name and address of hospital and date.

Will the injury result in a permanent defect? Yes.

If so, what? Death.

Did you request your employer to provide medical attendance?

8 Has he done so?

Signed, this 11th day of April, 1921, at Oneida, N. Y.

FRANK P. McNAMARA,
20 Elizabeth Street, Oneida, N. Y.

STATE OF NEW YORK,
County of Madison, ss:

On this 11th day of April, 1921, personally appeared before the undersigned, a Notary Public in and for the said County and State, the above named Frank P. McNamara, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name thereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment.

[SEAL.] D. C. BURKE.

Postoffice address, 37 Madison St., Oneida, N. Y.

Form CS-4.

Attending Physician's Report.

Original copy mailed Commission 4/15/21.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.
Syracuse Office: 428 South Salina Street.
Division of Claims.
Case No. —. S.
Case of John J. McNamara.

9 1. Name of injured person: John J. McNamara, address Syracuse, N. Y.

2. Name of employer: N. Y. S. R. R., address Syracuse, N. Y.

3. Date of accident: 3/23/21, at 6:20 A. M. Was first treatment rendered by you? Yes. When? 3/23/21.

4. If not by whom ——. Address ——.

5. Who engaged your services? Employer.

6. Was injured person removed to hospital? No. Name of hospital ——. Address ——.

7. Give an accurate description of the nature and extent of the injury: Fracture of ribs left side auxiliary line from 4th to 9th. Fracture left clavicle. Hemorrhage of brain.

8. Will the injury result in (*a*) a permanent defect? ——. If so, what? ——. (*b*) facial or head disfigurement ——.

9. Is ankylosis present? ——. If so, where and to what degree? ——.

10. Previous to this accident was there loss of use of hand, arm, foot, leg or eye? No.

11. On what date do you think the injured can resume work? Died same day.

12. State, in patient's own words, how accident occurred? Fell into pit at Cortland Ave. Station.

FRANCIS J. RYAN,
Attending Physician.

Syracuse, N. Y.
Graduate of Syracuse year 1899.
Dated at Syracuse this 13th day of April, 1921.

10 Form CS-19.

Proof of Death—Affidavit of Employer.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.
Syracuse O-ce: 428 South Salina Street.
Division of Claims.
Case No. 604338-2. S.
Case of John J. McNamara.
Name, New York State Railways. April 9, 1921.
Address, 305 Gridley Bldg., Syracuse, N. Y.

In the matter of the death of John J. McNamara, late of Syracuse, N. Y., who was injured about 5:30 A. M. on the 23rd of March, 1921.

What is your name in full? A. D. Brown.

What is your postoffice address? 305 Gridley Bldg., Syracuse, N. Y.

What is the name of the firm or corporation with which you are connected? New York State Railways.

What is the kind and character of the business conducted? Street railways.

In what company is compensation insurance carried? Self insurer.

What is your official title? Claim agent.

How long had you been personally acquainted with the deceased? 12 years.

How long was he in youor employ? 29 years.

In what capacity was he in your employ? Motorman.

What were his average daily wages? $5.09.

11 Do you know, as a matter of personal knowledge, that he was accidentally or otherwise injured? No.

What are the full particulars as to how, when and where he was so injured? He came in Tallman Station and told station master that he had fallen in pit in Cortland avenue barn. Was taken to physician's office and died soon after reaching that office.

What are the names, ages and residence addresses of his widow and children? Understand he has none.

On what date did he die? March 23, 1921.

What are the names and addresses of all the persons who were present at the time of the injury? None known.

Remarks: ——.

Dated at Syracuse, N. Y., this 9th day of April, 1921.

(Signature) ANCIL D. BROWN.

Witness to signature:
ESTHER E. MILLER.

P. O. address of witness: 305 Gridley Bldg.

STATE OF NEW YORK,
County of Onondaga, ss:

On this 9th day of April, 1921, personally appeared before the undersigned, a Notary Public in and for the said county and state, the above named Aneil D. Brown, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being duly advised in the premises, subscribed his (her) name hereto in my presence, and made oath that the foregoing statements, and each and all of them are
12 full and true, and are made without reservation or concealment.

[SEAL.] H. E. CADY,
Notary Public.

Postoffice address, 305 Gridley Bldg.

Form CS-21.

Proof of Death—by Undertaker.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.
Syracuse Office: 428 South Salina Street.
Division of Claims.
Case No. 604338-2 S.
Case of J. J. McNamara vs. N. Y. State Rys.

STATE OF NEW YORK,
County of Madison, ss:

Robert H. Iles, being duly sworn, says, that he is a duly licensed undertaker of the City of Oneida, N. Y., at Main Street, that as such he was required on the 23rd day of March, 1921, to prepare the dead body of —— —— for burial; that he placed a coffin, containing the said body, in a grave in Cleveland cemetery; that he was directed to conduct such burial by Frank P. McNamara, 20 Elizabeth St., Oneida, who authorized the following:

Casket and services	$210.00
Outside case	18.00
Coaches	42.20
Embalming and services	15.00
Hearse	17.00
Shirt, collar, tie and buttons	5.25
13 Removing remains from Syracuse to Oneida via auto hearse	15.00
Auto hire at Syracuse	5.50
Total	$327.95

That he was informed said bill would be paid by the administrator; that no part of said bill of expenses so authorized for said burial has been paid.

(Signed) KENNA & ILES,
Per ROBERT H. ILES.

Subscribed and sworn to before me, this 11th day of April, A. D. 1921.

THOMAS J. McCONLIN,
Notary Public.

Certificate of person who made funeral arrangements will be required below unless itemized bill of undertaker endorsed "correct" by such person, is attached.

Certificate of Person Authorizing Burial.

I hereby certify that I have read the foregoing affidavit of Robert H. Iles, undertaker; that I authorized the items of expense therein amounting to $327.95, as the brother of deceased workman.

(Signed) FRANK P. McNAMARA.

(NOTE.—The entire amount allowed for burial under the Workmen's Compensation Act cannot exceed $100.00.)

14 Form C-25.

Original copy mailed Commission 4/15/21.

Proof of Death to be Filled Out by Physician Last in Attendance on Deceased.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.
New York Office: 1 Madison Avenue.
Bureau of Claims.
Claim No. 604338-2 S.
Case of J. J. McNamara vs. N. Y. State Rys.

Name of the deceased in full? John J. McNamara.
Name of employer? N. Y. S. Rys., Syracuse, N. Y.
How long have you known the deceased? About 15 years.
How long have you been medical adviser of deceased? Not for about 6 years.
Age at death — years.
Married or single? Single.
Name and age of wife —.
Name and ages of children under 18, ——.
Place of death (give street number, city or town and State): No. 664 S. Salina Street, City or Town of Syracuse, State of New York.

Occupation at the time of death? Electric car motorman.
Date of your first visit or prescription? March 23, 1921. Date of your last visit, March 23, 1921.
Date of death, March 23, 1921.
State the remote cause of death. ——.
15 State explicitly the immediate cause of death: Fracture left clavicle and fracture of ribs from 4th to 9th left side.
Did you see the body of the deceased and did you identify it as that of the workman injured at Cortland Ave. Station while in the employ of New York State R. R., of Syracuse, N. Y.
If coroner's inquest held, give coroner's name and address. No.
Was deceased attended by any other physician during last illness? If so, state his name and address. No.
Have you any interest in this claim? No. If so, what? ——.
Have you stated all the material facts connected in any way with this death? Yes.
So far as you know, is there any reason to suspect that this case is not a perfectly fair one, and above all suspicion of concealment of necessary facts and information? None.

Dated April 13, 1921.

FRANCIS J. RYAN,
Attending Physician.

Syracuse, N. Y.

Degree M. D. Year 1899.
College, Syracuse, N. Y.

16 D. C. Burke,

City Attorney, Oneida, N. Y.

Oneida, N. Y., Oct. 17, 1921.

N. Y. State Dept. of Labor,
120 W. Jefferson Street,
Syracuse, N. Y.

GENTLEMEN:

In re J. J. McNamara vs. N. Y. S. Railways.

Claim was made in this case in April of this year. There are no dependents entitled to compensation under the law. Claim was made only for the $100 allowed for funeral expenses. We filled in your forms once and sent them to you. If that is the only way to straighten the matter out, we could do this again.

Respectfully yours,

D. C. BURKE.

Hearing Before the Industrial Board.

State Department of Labor,

Court House, Syracuse, N. Y.

J. J. McNamara, Deceased. Dec. 31, 1921.
N. Y. State Rys., Employer.
Self-Insured.
Claim No. 604338-2.

Present:

J. S. Whipple, Referee.
F. E. Burke, Hearing Stenographer.

17 Appearances:

Mr. A. D. Brown, for the Employer.

The Referee: What is the proposition; any dependents?
Mr. Brown: No dependents.
The Referee: No widow,—then it is just the question of the state payment.
Mr. Brown: Yes.
The Referee: What about funeral expenses?
Mr. Brown: I don't know. I question this Subdivision 8 of Section 15. Do you want me to read these objections into the record?
The Referee: Yes, read them.
Mr. Brown (reading): "The employer and self-insurer objects to the rendition of an award to the State Treasurer of $900, under the provisions of Subdivision 8 of Section 15 of the Workmen's Compensation Law of the State of New York, which subdivision was enacted by Chapter 760 of the Laws of 1920, upon the following grounds:

1. Such award is so unfair and unreasonable in amount, that to compel payment thereof will deprive the employer and self-insurer of its property in contravention of the due process clause of the 14th Amendment to the Constitution of the United States.

2. Such award is in the nature of a tax, imposed only on the happening of a contingency and is of unequal application, in contravention of the equal protection clause of the 14th Amendment to the Constitution of the United States.

18 3. The award is unconstitutional in that it takes property without due process of law in violation of the State Constitution and Federal Constitution.

4. That it is in violation of the State Constitution and Federal Constitution in that it is not a proper exercise of the police powers of the State- of the United States.

5. That it violates the provisions of the New York State Workmen's Compensation Law, Chapter 816 of the Laws of 1913 as amended and reinacted by Chapter 41 of the Laws of 1914 constituting Chapter 67 of the Consolidated Laws as amended, in that it provides a payment by the employer to men other than employees.

6. That it is discriminatory legislation in that it levies a tax upon only those industries which come within the provisions of Chapter 816 of the Laws of 1913 as amended and reinacted by Chapter 41 of the Laws of 1914 constituting Chapter 67 of the Consolidated Laws as amended.

7. That the amount required to be paid is arbitrary and unjust and in violation of the police power of the State.

8. That it is in violation of the due process clause of the 14th Amendment of the United States Constitution."

The Referee: Has anybody ever raised these before?

Mr. Brown: I understand they have been raised and taken to the Court of Appeals, but in such shape that they couldn't be taken to the United States Supreme Court. I am raising these ques-
19 tions because I understand Commissioner Sayre wants them raised.

The Referee: That is all right. Do you raise them to the two payments, the $100 and the $900?

Mr. Brown: That Section 7 about the $100, I am not raising them on that.

The Referee: You don't object to $100 for funeral expenses or the $100 under Section 7; you make your point on the $900?

Mr. Brown: Yes, on the $900.

The Referee: I haven't looked the file over enough to know about dependents. Are you sure there are no dependents?

Mr. Brown: He left no widow, the brother and sister are over age, there is no father and no mother. I understand it is a clear case.

The Referee: In this case record shows that deceased left no father, mother, widow, or children and no brothers and sisters who were dependent or entitled to death benefits under the law. Carrier raises the question of illegality of payment of the statutory amount of $900 to the State and files objection in writing. There is no objection to the $100 for funeral expenses nor to the $100 also provided in the statute to go to the State. Award is made for $100 for funeral expenses to be paid to the administrator of the estate, Frank P. McNamara, 20 Elizabeth St., Oneida, N. Y. Award is also made to the State of $100 as provided in the statute. The objections of the carrier that award in this case under the statute of $900 to the State is illegal are overruled and award for $900 is also made,
20 making a total of $1,000 to the State as provided by the statute, and the case is closed.

Mr. Brown: What is our time to appeal?

The Referee: Thirty days after you get the notice.

Objections to Award.

The employer and self-insurer objects to the rendition of an award to the State Treasurer of $900, under the provisions of Subdivision 8 of Section 15 of the Workmen's Compensation Law of the State of New York, which Subdivision was enacted by Chapter 769 of the Laws of 1920, upon the following grounds:

1. Such award is so unfair and unreasonable in amount, that to compel payment thereof will deprive the employer and self-insurer of its property in contravention of the due process clause of the 14th Amendment to the Constitution of the United States.

2. Such award is in the nature of a tax, imposed only on the happening of a contingency and is of unequal application, in contravention of the equal protection clause of the 14th Amendment to the Constitution of the United States.

3. The award is unconstitutional in that it takes property without due process of law in violation of the State Constitution and Federal Constitution.

4. That it is in violation of the State Constitution and Federal Constitution in that it is not a proper exercise of the police
21 powers of the State- of the United States.

5. That it violates the provisions of the New York State Workmen's Compensation Law, Chapter 816 of the Laws of 1913 as amended and reinacted by Chapter 41 of the Laws of 1914 constituting Chapter 67 of the Consolidated Laws as amended, in that it provides a payment by the employer to men other than employees.

6. That it is discriminatory legislation in that it levies a tax upon only those industries which come within the provisions of Chapter 816 of the Laws of 1913 as amended and reinacted by Chapter 41 of the Laws of 1914 constituting Chapter 67 of the Consolidated Laws as amended.

7. That the amount required to be paid is arbitrary and unjust and in violation of the police power of the State.

8. That it is in violation of the due process clause of the 14th Amendment of the Constitution.

Minutes from Folder.

604,338-2—J. S. W.

J. J. McNamara, Dec'd; N. Y. State Rys.: Self No. 102 1-5 46.

No appearances for the claimant; Mr. A. D. Brown for the employer.

In this case record shows that deceased left no father, mother, widow or children and no brothers and sisters who were dependent or entitled to death benefits under the law.

Carrier raises the question of illegality of payment of the
22 statutory amount of $900 to the State and files objection in writing. There is no objection to the $100 for funeral expenses nor to the $100 also provided in the statute to go to the State.

Award is made for $100 for funeral expenses to be paid to the administrator of the estate, Frank P. McNamara, 20 Elizabeth St., Oneida, N. Y. Award is also made to the State of $100 as provided in the statute. The objections of the carrier that award in this case under the statute of $900 to the State is illegal is overruled and award for $900 is also made, making a total of $1,000 to the State as provided by the statute.

Closed. (Disc. not transc.—5.)

Conclusions of Fact, Ruling of Law, and Award.

State Industrial oBard.

Death Case No. 604,338.

In the Matter of

The Claim for Compensation under the Workmen's Compensation Law Made by the State Treasurer Arising Out of the Death of J. J. McNarama.

vs.

New York State Railways, Employer and Self-Insurer.

This claim came on for hearing before the State Industrial
23 Board at Syracuse, New York, on December 31, 1921.

Appearances:

Gannon, Spencer & Mitchell, Esqs.,
Attorneys for Employer and Self-Insurer.

All the evidence having been heard and duly considered, the State Industrial Board makes its Conclusions of Fact, Ruling of Law, and Award, as follows:

Conclusions of Fact.

1. On March 23, 1921, the day on which John J. McNamara sustained the injuries which resulted in his death on the same day, he resided at 105 Anderson Avenue, Syracuse, New York, and was employed as a motorman by the New York State Railways, with office and principal place of business at Syracuse, New York; said employer being engaged in the operation of railways within the State of New York.

2. On March 23, 1921, while the said John J. McNamara was engaged in the regular course of his employment, and while working

for his employer at the car barn at Syracuse, N. Y., he fell into a pit thereat, whereupon he sustained injuries in the nature of a fracture of the ribs, left side, auxiliary line from the 4th to the 9th; a fracture of the left clavicle, as well as a hemorrhage of the brain, whereupon death ensued as the result of said injuries on March 23, 1921; his death being the direct result of the injuries which he sustained on March 23, 1921.

3 The injuries which resulted in the death of John J. McNamara were accidental injuries, and arose out of and in the course
24 of his employment.

4. The average weekly wage of John J. McNamara was the sum of $29.37.

5. John J. McNamara left him surviving no wife or child or children under the age of 18 years; and left him surviving no father or mother or brothers or sisters dependent upon him at the time he sustained the injuries which resulted in his death.

There is no person or persons entitled to compensation under the Compensation Law in respect of the death of John J. McNamara.

Ruling of Law.

This claim comes within the provisions of the Workmen's Compensation Law.

Award.

Award of compensation is hereby made against New York State Railways, employer and self-insurer, to the State Treasurer in the sum of $100.00 in respect to the death of John J. McNamara, pursuant to the provisions of Section 15, Subdivision 7 of the Workmen's Compensation Law. The objection of the carrier that award in this case under the statute as per Section 15, Subdivision 8, of $900 to the State is illegal, is overruled, and award of compensation is hereby made to the State Treasurer in the sum of $900 in respect of the death of John J. McNamara, pursuant to the provision of Section 15, Subdivision 8, of the Workmen's Compensation Law, making a total of $1,000.00 to the State Treasurer, as provided by law.

Further awarded to Frank P. McNamara, of 20 Elizabeth Street, Oneida, New York, in the sum of $100.00 on account of the
25 funeral expenses of John J. McNamara, deceased.

Dated, April 10, 1922.

STATE INDUSTRIAL BOARD.
JOHN D. HIGGINS,
Chairman.
RICHARD H. CURRAN.

Affidavit of No Opinion.

Supreme Court, Appellate Division, Third Department.

Before the State Industrial Board, Respondent.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

STATE OF NEW YORK,
County of Onondaga,
City of Syracuse, ss:

Charles H. Goebel, being duly sworn, deposes and says: That he is one of the attorneys of counsel for the appellants in the above entitled proceeding; that he is familiar with this file; that no
26 opinion was rendered by the State Industrial Board in making the award and decision herein.

CHARLES E. SPENCER.

Subscribed and sworn to before me this 22nd day of April, 1922.

CHAS. H. GOEBEL,
Comm'r of Deeds.

Certification of the Record.

I, C. A. Meeker, Secretary of the State Dept. of Labor, do hereby certify that I have compared the foregoing papers except the Statement Under Rule 234 with the respective originals thereof on file in the office of the State Dept. of Labor and that the same are true and correct copies of said originals and of the whole thereof, and that said papers constitute all of the papers and the proceedings herein, including the evidence which were before the State Industrial Board in relation to the foregoing claim.

In witness whereof I hereunto set my hand and the official seal of the State Dept. of Labor this 27th day of April, 1922.

C. A. MEEKER,
Secretary.

27 *Order for Settling and Filing Case.*

It is hereby ordered that the foregoing printed record is hereby settled as and for the record before the Supreme Court, Appellate Division, Third Department, upon the appeal herein, except that

stipulated by the parties to be omitted, and the same is hereby ordered filed in the office of the clerk of the Supreme Court, Appellate Division, Third Department.

Dated, New York, April 27, 1922.

JOHN D. HIGGINS,
Chairman State Industrial Board.

28 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Department Held at the Court House, in the City of Albany, N. Y., Commencing on the 2nd Day of May, 1922.

Present:

Hon. A. V. S. Cochrane,
Presiding Justice.
Hon. Henry T. Kellogg,
Hon. Michael H. Kiley,
Hon. C. Van Kirk,
Hon. Harold J. Hinman,
Associate Justices.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

The above named New York State Railways having appealed from an award of the State Industrial Board entered in the office of the State Industrial Commissioner on the 31st day of December,
29 1921, whereby an award was made to the State Treasurer for $900 pursuant to section 15, subdivision 8, of the Workmen's Compensation Law and said appeal having come on to be heard in this Court and having been argued by William H. Foster, Esq., of Counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Board, and due deliberation having been had thereon:

Now, on motion of Charles D. Newton, Attorney General, Attorney for the State Industrial Board, it is

Ordered, that the award of the State Industrial Board appealed from be and the same hereby is unanimously affirmed, with sixty dollars costs to the Industrial Board.

JOSEPH H. HOLLANDS,
Clerk.

A Copy.
JOSEPH H. HOLLANDS,
[L. S.] *Clerk.*

30 *Notice of Appeal.*

Court of Appeals, State of New York.

Before the State Industrial Board, Respondent.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

SIRS:

Please Take Notice that New York State Railways, employer, and self-insurer, hereby appeal to the Court of Appeals from the Judgment and Order of Affirmance of the Supreme Court, Appellate Division, Third Department, entered in the office of the Clerk of the Appellate Division on the 16th day of May, 1922, and from each and every part of said order.

Dated, Syracuse, N. Y., May 16, 1922.

Yours, etc.,

WILLIAM H. FOSTER,
Attorney for Appellants.

Office and P. O. Address, 405 Union Bldg., Syracuse, N. Y.

31 To:

R. M. Barber, esq., Clerk, Court of Appeals,
Albany, N .Y.
Jos. H. Holiands, Esq., Clerk, App. Div.,
Third Department, Albany, N. Y.
Hon. Chas. D. Newton, Attorney General,
Capitol, Albany, N. Y.
Frank P. McNamara, 20 Elizabeth St.,
Oneida, N. Y.
Hon. Henry D. Sayer, Industrial Comm'r,
124 East 28th St., New York City.

Affidavit of No Opinion.

Court of Appeals, State of New York.

Before the State Industrial Board, Respondent.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellant.

STATE OF NEW YORK,
County of Onondaga,
City of Syracuse, ss:

Charles H. Goebel, being duly sworn, deposes and says:
32 that he is one of the Attorneys for the appellants in the above entitled action and is familiar with this file, that no opinion was rendered by the Appellate Division in affirming the award of compensation herein.

CHARLES H. GOEBEL.

Subscribed and sworn to before me this 16th day of May, 1922.

HARRY L. KENYON,
Comm'r of Deeds.

Stipulation.

Court of Appeals, State of New York.

Before the State Industrial Board, Respondent.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

vs.

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

It is hereby stipulated by and between the Attorneys for the respective parties hereto that the foregoing record contains
33 all of the papers and proceedings including the evidence which were before the State Industrial Board in relation to the foregoing claim and that the same are true and correct copies of the originals and the whole thereof.

It is further stipulated that the foregoing case which contains all the evidence introduced at the hearings of this claim be and the same hereby is settled as the case herein and it is further stipulated that the foregoing printed record be filed in the office of the Clerk of the Court of Appeals, State of New York, as the case on appeal herein.

It is further stipulated that certification by the Secretary of the Department of Labor be waived.

CHAS. D. NEWTON,
Attorney General,
Attorney for the State Industrial Board.
WILLIAM H. FOSTER,
Attorney for Appellant.

34 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

against

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the claim of J. J. McNamara, claimant-respondent, against New York State Railways, employer-appellants, as same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Albany, State of New York, this 7th day of June, 1922.

[Seal of Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division,
Supreme Court, Third Department.

35 Supreme Court of the United States.

NEW YORK STATE RAILWAYS, Plaintiff-in-Error,

against

N. MONROE MARSHALL, as State Treasurer of the State of New York; John D. Higgins, Richard H. Curran, and Rosalie L. Whitney, as and Constituting the State Industrial Board of the State of New York, Defendants-in-Error.

Prayer for Reversal.

To the Supreme Court of the United States:

Comes now New York State Railways, plaintiff-in-error, and prays for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the Clerk of the Appellate Division thereof, in the Third Judicial Department of said State, on the 16th day of May, 1922, affirming a decision and award of the State Industrial Board of the said State, a reversal of which is likewise prayed, entered on the 31st day of December, 1921; and plaintiff-in-error further prays for a reversal of a judgment of the Court of Appeals of said State, rendered on the 31st day of May, 1922, affirming said order hereinbefore first mentioned.

And your petitioner will ever pray.

Dated, June 2, 1922. ROBERT E. WHALEN,
Of Counsel for New York State Railways.

June 5, 1922.

Application for writ of error presented this day.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

36 Supreme Court of the United States.

NEW YORK STATE RAILWAYS, Plaintiff-in-Error,

against

N. MONROE MARSHALL, as State Treasurer of the State of New York; John D. Higgins, Richard H. Curran, and Rosalie L. Whitney, as and Constituting the State Industrial Board of the State of York, Defendants-in-Error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of New York State Railways, a corporation organized and existing under and pursuant to the laws of the State of New York, respectfully shows:

First. On or about the 11th day of April, 1921, one Frank P. McNamara, as administrator of the estate of John J. McNamara, deceased, commenced before the State Industrial Commission of the State of New York, a special proceeding against your petitioner, under Chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, and therein alleged that said John J. McNamara, brother of said Frank P. McNamara, at about six o'clock in the morning of March 23rd, 1921, while employed as a motorman by your petitioner at its car barns in the City of Syracuse, New York, sustained certain injuries, arising out of and in the course of his employment, which injuries resulted in the death of said John J. McNamara on the same day.

Second. In said proceeding before said Commissioner your petitioner, which is a self-insurer, appeared and thereupon
37 such proceedings were had and taken that, pursuant to said Workmen's Compensation Law, an award of One Hundred Dollars ($100.00) for the funeral expenses of said deceased was made and, it appearing that said deceased left him surviving no persons dependent upon him, your petitioner was directed to pay to the State Treasurer of the State of New York the sum of Nine Hundred Dollars ($900.00), as prescribed by subdivision 8 which was added to Section 15 of said Workmen's Compensation Law by Chapter 760 of the Laws of 1920, and which subdivision reads as follows:

"An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the State Board of Vocational Education is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance; but such additional compensation shall not exceed ten dollars a week. The expense shall be paid out of special fund created in the following manner: The insurance carrier shall pay to the State Treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of nine hundred dollars. The State Treasurer shall be the custodian of this special fund and the Industrial Commission shall direct the distribution thereof."

Third. In said proceeding before said Commission your petitioner objected to the rendition of said award of Nine Hundred Dollars ($900.00) upon the following grounds:

(*a*) That such award would be so unfair and unreasonable in amount that to compel payment thereof would deprive your petitioner of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(*b*) That such award would be in the nature of a tax, imposed only on the happening of a contingency, and would be of such unequal application that to compel payment thereof would deny to your petitioner the equal protection of the laws, in contravention

of Section 1 of the Fourteenth Amendment to the Constitu-
38 of the United States.

Fourth. A written decision and award, made by the State Industrial Board, which meanwhile had succeeded to the jurisdiction of the said State Industrial Commission, was entered on the 31st day of December, 1921, wherein and whereby the said objections of your petitioner were overruled and the said sum of Nine hundred dollars ($900.00) was directed to be paid to the State Treasurer of the State of New York.

Fifth. From said decision and award of said State Industrial Board your petitioner duly appealed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, your petitioner, through its counsel, duly urged against the validity of said award of Nine Hundred dollars ($900.00), the contentions hereinbefore specified in paragraph Third of this petition, but said Appellate Division of the Supreme Court overruled said contentions and, by an order bearing date May 2nd, 1922, and entered in the office of the Clerk of said Appellate Division on the 16th day of May, 1922, said Appellate Division duly affirmed said decision and award of said State Industrial Board so entered on the 31st day of December, 1921.

Sixth. From said order of said Appellate Division your petitioner duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of said State in which could be had a decision of the questions so raised by said contentions of your petitioner hereinbefore specified in paragraph Third of this petition, and which contentions your petitioner, through its counsel, duly urged upon the argument of said appeal to the Court of Ap-
39 peals of the State of New York, which duly came on to be heard. But said Court of Appeals overruled said contentions of your petitioner and, by its judgment rendered May 31, 1922, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur, consisting of a copy of the said judgment of the said Court of Appeals and of the papers upon which said Court of Appeals made its said judgment, and said remittitur was filed on this 2nd day of June, 1922, in the office of the Clerk of said Appellate Division where said remittitur now remains of record.

Seventh. In said judgment of the Court of Appeals there was drawn in question the validity of a statute of the State of New York, to-wit, said Chapter 760 of the Laws of 1920, which added said subdivision 8 to Section 15 of said Workmen's Compensation Law, upon the ground of the repugnancy of said statute to the due process and to the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, but the decision was in favor of the validity of said statute.

Eighth. The above named N. Monroe Marshall, at the time when said award of Nine hundred Dollars ($900.00) was directed to be paid, was and now is State Treasurer of the State of New York. By virtue of the provisions of said Workmen's Compensation Law, said State Industrial Board, which is now composed of John D. Higgins, Richard H. Curran and Rosalie L. Whitney, appeared by the Attorney General of the State of New York, both in said Appellate Division and in said Court of Appeals, in support of the validity of said statute thus brought up for review by said appeals.

Wherefore, your petitioner prays that a writ of error may
40 be allowed and issued, directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record and papers in said special proceeding and for citation and supersedeas to stay execution, to the end that the errors of which your petitioner complains herein and in the assignment of errors herein filed may be reviewed and, if errors be found, corrected conformably to the Constitution and Laws of the United States.

And your petitioner will ever pray.

Dated, June 2, 1922.

NEW YORK STATE RAILWAYS,
By ROBERT E. WHALEN,
Of Counsel for New York State Railways.

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is the regularly retained counsel for the petitioner, New York State Railways, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true. That the reason why this verification is made by deponent is that said petitioner is a corporation, none of whose officers resides or is within the County of Albany, State of New York, where deponent resides and has his place of business.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 2nd day of June, 1922.

[Seal of Frank A. McNamee, Jr., Notary Public, Albany Co., N. Y.]

FRANK A. McNAMEE, JR.,
Notary Public, Albany County, N. Y.

41 Supreme Court of the United States.

NEW YORK STATE RAILWAYS, Plaintiff-in-error,

against

N. MONROE MARSHALL, as State Treasurer of the State of New York; John D. Higgins, Richard H. Curran, and Rosalie L. Whitney, as and Constituting the State Industrial Board of the State of New York, Defendants-in-error.

Assignment of Errors.

To the Supreme Court of the United States:

Comes now New York State Railways, plaintiff-in-error, and makes and files this its assignment of errors:

The Court of Appeals of the State of New York, in its judgment rendered on the 31st day of May, 1922, erred, as did also the Appellate Division of the Supreme Court, in and for the Third Judicial Department of said State, and the State Industrial Board of said State in overruling the contentions of your petitioner:

1. That the award of Nine Hundred Dollars ($900.00) made herein to the State Treasurer, pursuant to subdivision 8, added to Section 15 of the Workmen's Compensation Law of the State of New York by Chapter 760 of the Laws of 1920 of the State of New York, is so unfair and unreasonable in amount that to compel payment thereof will deprive your petitioner of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

42 2. That said award is in the nature of a tax, imposed on the happening of a contingency, and is of such unequal application that to compel payment thereof will deny to your petitioner the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Dated, June 2, 1922.

ROBERT E. WHALEN,
Of Counsel for New York State Railways.

43 [Endorsed:] Supreme Court of the United States. New York State Railways, Plaintiff-in-error, against N. Monroe Marshall, as State Treasurer &c. & others, Defendants-in-error. Prayer for reversal, Petition for Writ of Error, Assignment of Errors. Robert E. Whalen, of Counsel for Plaintiff-in-error. Office & Post-office Address, 126 State Street, Albany, N. Y.

44 In the Supreme Court of the United States of America.

NEW YORK STATE RAILWAYS, Plaintiff in Error,

against

N. MONROE MARSHALL, as State Treasurer of the State of New York; John D. Higgins, Richard H. Curran, and Rosalie L. Whitney, as and Constituting the State Industrial Board of the State of New York, Defendants in Error.

STATE OF NEW YORK,
County of Albany, ss:

Frank A. McNamee Jr., being duly sworn, deposes and says that he resides at Albany, N. Y., and is 29 years of age; that on the 17th day of July, 1922, at the City of Albany, New York, he served the annexed citation upon N. Monroe Marshall, by delivering to and leaving with him personally a true copy thereof, and deponent further says that he knew the person so served to be the State Treasurer of the State of New York.

FRANK A. McNAMEE, JR.

Subscribed and sworn to before me, this 17th day of July, 1922.

ELSIE H. SAGER,
Notary Public, Albany County, N. Y.

45 UNITED STATES OF AMERICA, *ss:*

To N. Monroe Marshall, as State Treasurer of the State of New York; John D. Higgins, Richard H. Curran, and Rosalie L. Whitney, as and constituting the State Industrial Board of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, wherein New York State Railways is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

46 On this 11th day of July, in the year of our Lord one thousand nine hundred and twenty two, personally appeared before me, the subscriber, Hugh H. McCurdie and makes oath that he delivered a true copy of the within citation to John D. Higgins, Chairman The Industrial Board, State of New York.

HUGH H. McCURDIE.

Sworn to and subscribed the 11th day of July, A. D. 1922.

[Seal of H. I. Rogers, Notary Public, Bronx County.]

H. I. ROGERS,
Notary Public, Bronx County, No. 42.

Register's No. 175.
Certificate filed in N. Y. County.

Due service of a copy of the within citation is hereby admitted, this 11th day of June, nineteen hundred and twenty-two.

JOHN D. HIGGINS,
Chairman Industrial Board of the State of New York.

Due service of a copy of the within citation is hereby admitted this 11th of June, nineteen hundred and twenty-two.

CHARLES D. NEWTON,
Attorney General.
By FREDERICK H. CUNNINGHAM,
Deputy Attorney General in Charge of Labor Department Bureau.

47 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between New York State Railways, plaintiff in error, and N. Monroe Marshall, as State Treasurer of the State of New York, John D. Higgins, Richard H. Curran and Rosalie L. Whitney, as and constituting the State Industrial Board of the State of New York, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the
48 Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said plaintiff in error, as by its

complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

49 [Endorsed:] Supreme Court of the United States, October Term, 1922. New York State Railways, Plff. in Error, vs. N. Monroe Marshall, as State Treasurer, &c., et al. Writ of Error.

50 Supreme Court, Appellate Division, Third Judicial Department.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

against

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

In obedience to the commands of the writ of error herein allowed June 5th, 1922, I herewith transmit to the Supreme Court of the United States a duly certified transcript of all and singular the record and proceedings in the above entitled cause, together with said writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Albany, State of New York, this 28th day of July, 1922.

[Seal of the Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

51 Supreme Court, Appellate Division, Third Department.

In the Matter of

The Claim of J. J. McNAMARA for Compensation under the Workmen's Compensation Law, Claimant-Respondent,

against

NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that there have been lodged with me, as such Clerk, this day, in the above entitled cause:

1. The original bond, of which a copy is hereto annexed;

2. Two copies of the writ of error as herein set forth, one for the defendant in error above and one to file in my office.

3. One copy of the prayer for reversal, petition and assignment of errors herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 28th day of July, 1922.

[Seal of the Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

52 Duplicate.

Know all men by these presents, That we, New York State Railways, as Principal, and The Ætna Casualty and Surety Company, of Hartford, Connecticut a Corporation organized under the Laws of the State of Connecticut, and having a principal place of business for the State of New York at 404 Union Building, Syracuse, New York, as Surety, are held and firmly bound unto N. Monroe Marshall, as State Treasurer of the State of New York, John D. Higgins, Richard H. Curran and Rosalie L. Whitney, as and constituting the State Industrial Board of the State of New York, in the full and just sum of Five Hundred Dollars, to be paid to the said N. Monroe Marshall, as State Treasurer of the State of New York, John D. Higgins, Richard H. Curran and Rosalie L. Whitney, as and constituting the State Industrial Board of the State of New York, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Twenty-fourth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a Court of Appeals of the State of New York, in a suit depending in said Court, between Frank P. McNamara, as administrator, etc., and said New York State Railways, a final judgment was rendered against the said New York State Railways and the said New York State Railways having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said N. Monroe Marshall, as State Treasurer of the State of New York, John D. Higgins, Richard H. Curran and Rosalie L. Whitney, as and constituting the State Industrial Board of the State of New York be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said New York State Railways shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

53 NEW YORK STATE RAILWAYS,
By WILLIAM P. GANNON.
THE ÆTNA CASUALTY & SURETY CO.,
By H. H. WADSWORTH,
Resident Vice-President.

Attest:
GEORGE J. KESEL,
Resident Assistant Secretary.

Sealed and delivered in presence of
H. L. KENYON.

Approved by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Duplicate.

54

Duplicate.

Form S-873.

The Ætna Casualty and Surety Company,

Hartford, Connecticut.

Ætna.

Certificate of Authority of Resident Vice-President.

Know all men by these presents, that H. H. Wadsworth has been and is hereby appointed Resident Vice-President of The Ætna Casualty and Surety Company, of Hartford, Connecticut, at Syracuse, N. Y., and as such Resident Vice-President has full power and authority to sign and execute, on behalf of The Ætna Casualty and Surety Company, any and all bonds and undertakings, and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-Fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

In witness whereof, The Ætna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 23rd day of April, A. D. 1921.

THE ÆTNA CASUALTY AND SURETY COMPANY,

By A. R. SEXTON, *Secretary.*

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 23rd day of April, A. D. 1921, before me personally came A. R. Sexton, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Ætna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

C. E. MATHER,
Notary Public.

My Commission Expires Jan. 31, 1922.

55 Duplicate.

Form S-735-A.

The Ætna Casualty and Surety Company,

Hartford, Connecticut.

Ætna.

Certificate of Authority of Resident Assistant Secretary.

Know all men by these presents, that George J. Kesel has been and is hereby appointed Resident Assistant Secretary of The Ætna Casualty and Surety Company, of Hartford, Connecticut, at Syracuse, N Y., and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-Fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant

Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

In witness whereof, The Ætna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 11th day of March, A. D. 1921.

THE ÆTNA CASUALTY AND SURETY COMPANY,
By A. R. SEXTON,
Secretary.

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 11th day of March, A. D. 1921, before me personally came A. R. Sexton, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Ætna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

C. E. MATHER,
Notary Public.

My Commission Expires Jan. 31, 1922.

56 Duplicate.

Form S-975 A.

STATE OF NEW YORK,
County of Onondaga, ss:

On this Twenty-fourth day of June 1922, before me personally came H. H. Wadsworth, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Syracuse, N. Y.; that he is Resident Vice-President of The Ætna Casualty and Surety Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; that he signed his name thereto by like order; (if individual Attorney-in-Fact the following will not be completed). That he is acquainted

with George J. Kesel; that he knows him to be the Resident Assistant Secretary of said Company; that the signature of said George J. Kesel, subscribed to said instrument, is in the genuine handwriting of said George J. Kesel and was thereto subscribed by like order of said Board of Directors, and in the presence of him, the said H. H. Wadsworth.

JOHN R. BRUCE,
Notary Public.

At a regular meeting of the Board of Directors of the Company, duly called and held on the 28th day of December, A. D. 1911, the following By-Law was adopted:

Article 8. Resident Officers, Attorneys-in-Fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; Such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

Section 4. Attorneys-in-Fact may, subject to the provisions and limits named in their certificate of authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact when attested by any other Attorney-in-Fact shall be as binding upon the Company as if signed, sealed, and attested by any Officer of the Company.

At a regular meeting of the Board of Directors of the Company, duly called and held on the 25th day of April, A. D. 1912, the following By-Law was adopted:

Section 5. Attorneys-in-Fact may, subject to the provisions and limits named in their Certificate of Authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary.

STATE OF CONNECTICUT,
County of Hartford, ss:

I, H. B. Wetmore, of The Ætna Casualty and Surety Company, have compared the foregoing By-Laws with the originals thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same are true and correct transcripts therefrom, and of the whole of said original By-Laws.

Given under my hand and the seal of the Company, at Hartford, Connecticut, this 13th day of March, 1922.

[Seal of the Ætna Casualty and Surety Company, Hartford Conn.]

H. B. WETMORE,
Resident Assistant Secretary.

Duplicate.

The Ætna Casualty & Surety Company

of

Hartford, Connecticut.

Financial Statement as of December 31, 1921

Assets.		*Liabilities.*	
Mortgage Loans	$2,935,225.00	Premium Reserve	$6,068,978.17
Collateral Loans	383,815.05	Claim Reserve	3,226,941.68
Stocks & Bonds	8,522,819.50	Reserve for Accrued Taxes	357,542.67
Unpaid Premiums Subsequent to October 1, 1921	1,710,964.72	Reserve for Other Liabilities	732,895.21
Unpaid Premiums prior to *to* October 1, 1921	8,860.14		
Cash in Office & Banks	1,236,232.57		
Accrued Interest	186,023.46		
All other Assets	650,203.35		
Total Assets	15,634,143.79	Total Liabilities except Capital	10,386,357.73

Financial Statement as of December 31, 1921.—Continued.

Deduct Assets not allowed by Insurance Department, viz.:				
Unpaid Premiums prior to October 1, 1921	8,860.14			
Other Assets	166,417.80			
		175,277.94		
Admitted Assets on basis allowed by Insurance Departments		15,458,865.85		
			Surplus	3,247,786.06
			Less Assets not allowed by Insurance Departments	175,277.94
			Surplus on basis allowed by Insurance Departments	3,072,508.12
			Capital Stock	2,000,000.00
				5,072,508.12
			Total	15,458,865.85

STATE OF NEW YORK,
County of Onondaga, ss:

H. H. Wadsworth, being duly sworn, says that he is Resident Vice-President of The Ætna Casualty and Surety Company and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company as of December 31, 1921.

H. H. WADSWORTH.

Subscribed and sworn to before me this 24th day of June, 1922.

JOHN R. BRUCE,
Notary Public.

My Commission expires —— —, ——.

58 [Endorsed:] Ætna Life Insurance Company, Ætna Casualty and Surety Company, Automobile Insurance Company. $500.00 on behalf of New York State Railways in favor of N. Monroe Marshall, et al. June 24, 1922. Ætna Affiliated Companies: Among our lines are: Group Insurance (Life and Disability), Life (All forms), Accident, Health, Workmen's Compensation, Liability, including Employers', Public, Teams, Automobile, and General, Riot and Civil Commotion, Use and Occupancy, Parcel Post & Baggage, Marine, Combination Residence, Aircraft, Automobile (All coverages), Payroll Holdup, Burglary, Theft, Check Alteration and Forgery, Engine Breakage, Flywheel, Explosion, Water Damage, Sprinkler Leakage, Fire, Tornado, Plate Glass, Elevator. Absolute Security. Superior Service. Fidelity and Surety Bonds: Fidelity, Court, Fiduciary, Contract, Bank Depository, Notaries Public, Custom House, Internal Revenue, License and Franchise, Public Warehouses and Elevators, Federal and Public Official, Miscellaneous Indemnity. Ætna Life Insurance Company, Ætna Casualty and Surety Company, Automobile Insurance Company.

59 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of J. J. McNamara, for Compensation under the Workmen's Compensation Law, Claimant-Respondent, against New York State Railways, Employer and Self-Insurer, Appellants. Return to Writ of Error and Certificate of Lodgment.

Endorsed on cover: File No. 29,086. New York Supreme Court. Term No. 536. New York State Railways, plaintiff in error, vs. N. Monroe Marshall, as treasurer of the State of New York; John D. Higgins, Richard H. Curran, et al., &c. Filed August 7th, 1922. File No. 29,086.

BRIEF OF PLAINTIFF-IN-ERROR

Supreme Court of the United States.

OCTOBER TERM, 1923

No. 103

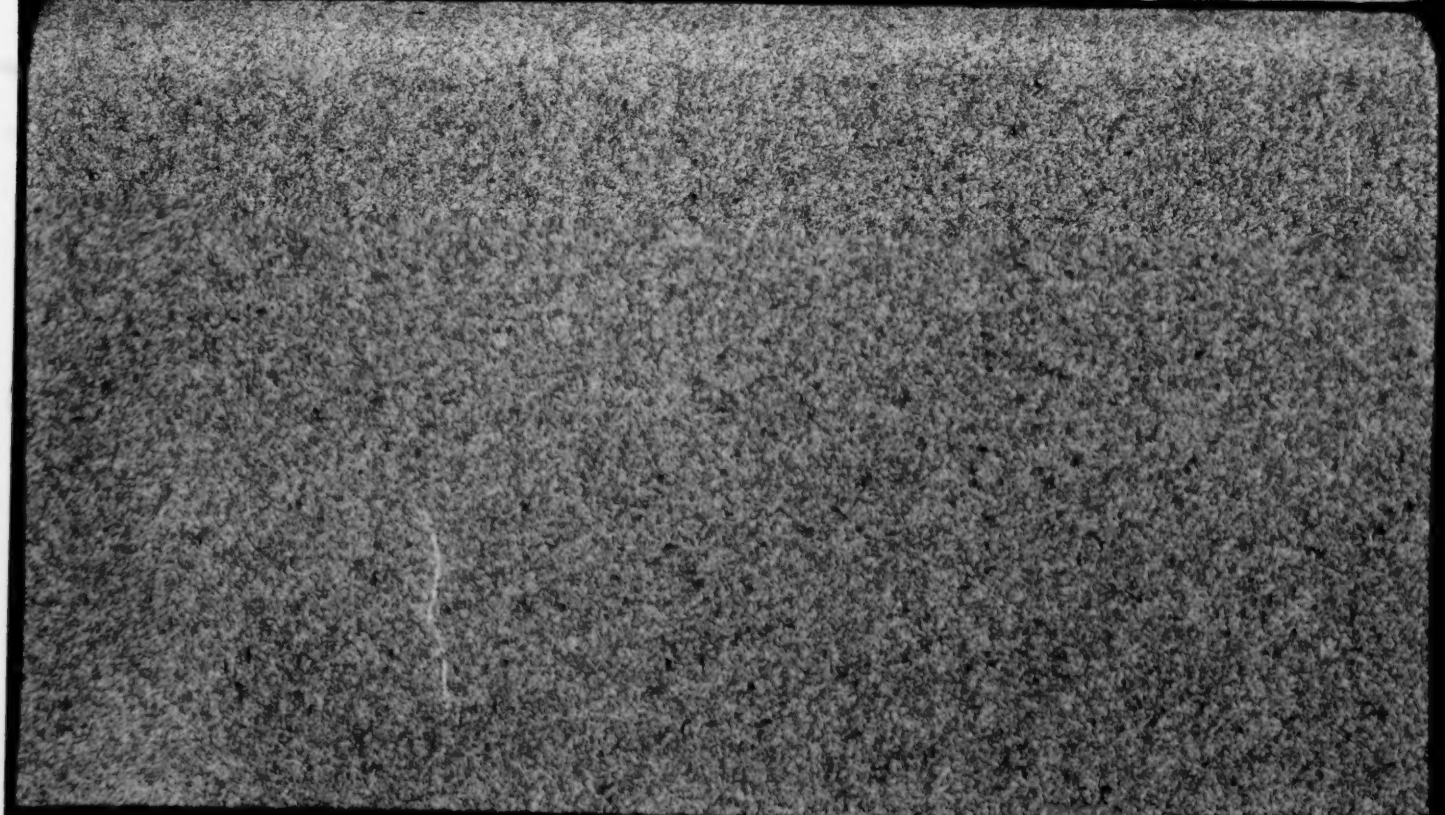
NEW YORK STATE RAILWAYS,
PLAINTIFF-IN-ERROR,

vs.

GEORGE K. SHULER, as Treasurer of the State of New York, et al.,
DEFENDANTS-IN-ERROR.

In Error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

ROBERT E. WHALEN, Albany, N. Y.,
Counsel for Plaintiff-in-Error.



BRIEF OF PLAINTIFF-IN-ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 103.

NEW YORK STATE RAILWAYS,

Plaintiff-in-error,

against

*GEORGE K. SHULER, as Treasurer of the State of New York, et al.,

Defendants-in-error.

In error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

Statement of the Case.

This case involves (Transcript, p. 26) the constitutionality, under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, of chapter 760 of the Laws of 1920 of the State of New York, which added to section 15 of the New York Workmen's Compensation Law, subdivision 8 thereof, reading as follows:

"8. Maintenance for employees undergoing vocational rehabilitation. An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who,

*On October 8, 1923, this Court substituted certain defendants-in-error, as successors in office to original parties.

under the direction of the state board of vocational education is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance; but such additional compensation shall not exceed ten dollars a week. The expense shall be paid out of special fund created in the following manner: the insurance carrier shall pay to the state treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of nine hundred dollars. The state treasurer shall be the custodian of this special fund and the industrial commission shall direct the distribution thereof."

So much of the New York Workmen's Compensation Law, thus amended, as is deemed necessary to the decision of this cause, is annexed to this brief as Appendix "A" thereof. (P. 17, *infra.*)

Chapter 760 of the New York Laws of 1920 not only added subdivision 8 to section 15 of the Workmen's Compensation Law, but also added to the Education Law a new article 47, entitled "The Rehabilitation Law," the material parts of which are annexed to this brief as Appendix "B" thereof. (P. 35, *infra.*)

Section 19, added to article I of the Constitution of the State of New York in 1913, effective January 1, 1914, is annexed to this brief as Appendix "C" thereof. (P. 41, *infra.*) It is also printed in full in 243 U. S., at pp. 195-196.

This proceeding was commenced by the administrator of the estate of John J. McNamara, deceased, before the State Industrial Board, established by the Workmen's Compensation Law of the State of New York, by presentation of a claim to recover "compensation" for death (Transcript, p. 5), alleged to have resulted from

injuries sustained by decedent while he was employed in a car barn of plaintiff-in-error.

There were no pleadings before the Industrial Board which, after a hearing (Transcript, pp. 12-13), found as a fact that decedent left him surviving no one entitled to compensation under the Workmen's Compensation Law, but, overruling the objections of plaintiff-in-error predicated upon the due process and equal protection clauses of the Fourteenth Amendment (Transcript, p. 14), awarded to the State Treasurer the sum of nine hundred dollars, in accordance with the provisions of subdivision 8 of section 15 of the Workmen's Compensation Law, which award was directed to be paid by plaintiff-in-error, a self-insurer. (Transcript, p. 16.)

The Appellate Division of the Supreme Court in the Third Judicial Department unanimously affirmed the award of the State Industrial Board. (Transcript, pp. 18, 24; 202 App. Div., 768.) On further appeal taken to the Court of Appeals, the Appellate Division's order of affirmance was in turn affirmed. (Transcript, pp. 1, 24.) The Court of Appeals sent down its remittitur to the Appellate Division, to which the writ of error from this Court is directed. (Transcript, pp. 24, 28; 233 N. Y., 681.)

In neither of the Appellate Courts was any opinion written, but the Appellate Division had previously sustained, with an opinion, the validity of the statute in question in *Watkinson v. Hotel Pennsylvania* (195 App. Div., 624), a decision which the Court of Appeals affirmed without opinion (231 N. Y., 562).

Specification of Errors.

Plaintiff-in-error contends that the Court of Appeals, as also the Appellate Division and the State Industrial Board, erred is not holding:

1. That the award of nine hundred dollars ($900.00) made herein to the State Treasurer, pursuant to subdivision 8, added to § 15 of the Workmen's Compensation Law of the State of New York by Chapter 760 of the Laws of 1920 of the State of New York, is so unfair and unreasonable in amount that to compel payment thereof will deprive plaintiff-in-error of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

2. That said award is in the nature of a tax, imposed on the happening of a contingency, and is of such unequal application that to compel payment thereof will deny to plaintiff-in-error the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Argument.

Statement of Facts.

On March 23, 1921, John J. McNamara, employed as a motorman by the plaintiff-in-error at its car barns in the city of Syracuse, N. Y., sustained certain injuries which arose out of and in the course of his employment and resulted in his death on the same day. (Transcript, pp. 5-6, 23.) His employment was in one of the hazardous occupations enumerated in Group 1 of § 2 of the Workmen's Compensation Law. (See Appendix "A," p. 17, *infra.*) Although McNamara left him surviving no dependents entitled to compensation under the Workmen's Compensation Law (Transcript, p. 13), the administrator of his estate initiated a proceeding before the State Industrial Board for compensation (Transcript, pp. 5-6), which the Board denied, but it directed plaintiff-in-error, a self-insurer, to make to the State Treasurer payment of $900 under the statute in question.

POINT I.

The compulsory payment of $900, prescribed by the statute under review deprives the employer, without fault, of its property, in contravention of the due process clause of the Fourteenth Amendment.

1. *Neither loss nor destruction of earning power is involved.*

The following excerpts from the opinion of this court in *New York Central R. R. Co. v. White* (243 U. S., 188) emphasize the stress placed upon the *compensatory* feature of the New York Workmen's Compensation Law as sustaining the validity of that statute, enacted in exercise of the police power, against the contention that it violated the due process clause of the Fourteenth Amendment (italics ours):

> "Compensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, *it is based solely on loss of earning power,* being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent." (P. 193.)

> "Under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that *he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity.*" (P. 197.)

> "The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent

in compensation. But, besides, *there is the loss of earning power,* a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however, it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the *loss of earning power* incurred in the common enterprise, irrespective of the question of negligence, *instead of leaving the entire loss to rest* where it may chance to fall—that is, *upon the injured employee or his dependents.*" (Pp. 203-204.)

"*The pecuniary loss* resulting from the employee's death or disablement must fall somewhere." (P. 205.)

"The subject-matter in respect of which freedom of contract is restricted is the matter of *compensation for human life or limb lost or disability incurred* in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." (P. 206.)

In *Mountain Timber Co. v. Washington* (243 U. S., 219), similar emphasis was placed by this court upon the *compensatory* design of the Washington Compensation Law, likewise sustained as not violative of the due process guaranty (italics ours):

"Sure and certain *relief for workmen,* injured in extra hazardous work, *and their families and dependents* is hereby provided." (P. 228, quoting from the first section of the Washington Act.)

"The States are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of *compensation for the loss of earning power* arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon particular injured employees and *their dependents.*" (P. 236.)

"Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce *disabling or mortal injuries* to the human beings employed is not a matter of wholly private concern." (P. 239.)

"We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce *personal injuries and disability with consequent loss of earning power* among the men and women employed, *and occasionally, loss of life of those who have wives and children or other relations dependent upon them for support,* and may require that these human losses shall be charged against the industry." (P. 243.)

This court has pointed out that "compensation for disabling and fatal injuries irrespective of the question of fault" was involved in the decisions of the cases which sustained the New York and the Washington Acts.

Middleton v. Texas Power and Light Co., 249 U. S., 152, 163.

Mr. Justice PITNEY, writing for the majority of this court in *Arizona Employers' Liability Cases* (250 U. S., 400, 425), affirmed the power of the people of Arizona, through constitutional and legislative provisions, to erect safeguards against "leaving the injured ones, and the dependents of those whose lives are lost through accidents due to the conditions of the occupation, to be a *burden upon the public.*" (Italics ours.) And at p. 428 he adverted to the sovereign power thus to regulate the conduct of those hazardous industries in which "human beings * * * in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him."

In *Ball v. Wm. Hunt & Sons, Ltd.* (1912) A. C. 496, cited at page 433 in Mr. Justice HOLMES' concurring opinion in the *Arizona Copper* case, Lord SHAW of Dunfermline declared that "the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to earn a wage which forms the standard upon which the compensation is reckoned." (P. 507.)

In New York Central R. R. Co. v. Bianc (250 U. S., 596, 601, an award for serious facial and head disfigurement was sustained because "a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment."

> "A sufficient vindication of compulsory Workmen's Compensation and Employers' Liability Acts, as it has seemed to this court, is found in the public interest of the State in the lives and personal security of those who are under the protection of its laws; from which it follows that,

when men are employed in hazardous occupations for gain, it is within the power of the State to charge the pecuniary losses arising from disabling or fatal personal injury, to some extent at least, against the industry after the manner of casualty insurance, instead of allowing them to rest where they happen to fall—upon the particular injured employees or their dependents."

Ward & Gow v. Krinsky, 259 U. S., 503, 512.

"These [Workmen's Compensation] acts were sustained, in their entirety, without any separate reference to the status of the dependents—although in the *White* case the right of a widow to compensation was directly involved—upon the broad ground that the State, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the just and reasonable exercise of its police power, that the loss of earning power sustained by an employee through an industrial accident resulting in his disability or death, constituting a loss arising out of the business and an expense of its operation, shall, in effect, be charged against the industry after the manner of casualty insurance, and to that end require the employer to make such compensation as may reasonably be prescribed for the loss thus incurred in the common enterprise, irrespective of the question of negligence, to the injured employee or to his surviving dependents."

Madera Sugar Pine Co. v Industrial Accident Commission of California, et al. (Decided June 4, 1923.)

"Workmen's Compensation legislation rests upon the idea of status not upon that of implied contract; that is upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of

> the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. * * * Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern * * * to escape condemnation as arbitrary, capricious or clearly unreasonable."
>
> Cudahy Packing Co. v Parramore, et al. (Decided December 10, 1923.)

2. *The statute is not a reasonable exercise of the police power.*

In upholding the New York Act, as originally enacted, this court in *New York Central R. R. Co. v. White* (243 U. S., 188) said (italics ours):

> "We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. * * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued

life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to *the protection of the lives and safety of those concerned* that they properly may be regarded as coming within the category of police regulations." (Pp. 206-207.)

So, too, the Washington Act was sustained as a valid exercise of the authority of that State to enact such legislation as reasonably may be deemed to be necessary to promote the health, safety and general welfare of its people.

Mountain Timber Co. v. Washington,
243 U. S., 219, 238, 243.

The opinion in *Arizona Employers' Liability Cases* (pp. 419-422) is addressed to consideration of the question whether the Arizona Act could be classified as legislation enacted in the public interest and reasonably designed to promote the general welfare.

The employer's enforced contribution of $900 to the rehabilitation fund will compensate neither McNamara, who has died, nor dependents of his, who do not exist, for the loss of his earning power. It can be fairly regarded as nothing else than a penalty imposed, not for the benefit of the injured employee or his dependents, but as a levy made upon the employer in furtherance of the rehabilitation of such employees of other employers as have been incapacitated in the course of hazardous work. No less arbitrary and unreasonable would be an enactment requiring a building contractor, should a structure in course of erection by him collapse, without resultant injury or death, to contribute $900 to a rehabilitation fund.

3. *Hence the statute in question is arbitrary and oppressive.*

The subject of judicial inquiry, in such a case as this, is whether the statute under consideration "is arbitrary and unreasonable, from the standpoint of natural justice" (*White* case, at p. 202); or "so extravagant or arbitrary as to constitute an abuse of power." (*Mountain Timber* case, at p. 237.) Such was the test applied in determining the validity of the Arizona Act. (250 U. S., pp. 421-422, 426.) As recently as in *Cudahy Packing Co. v. Parramore* (decided December 10, 1923) this Court examined the question whether the liability prescribed by the Utah Workmen's Compensation Act was imposed unreasonably, capriciously and arbitrarily.

How unreasonable, capricious and arbitrary was the action of the New York legislature in fixing $900 as the amount of the contribution compelled by the statute under review is demonstrated by the circumstance that, when it came to a general revision of the Workmen's Compensation Law, by chapter 615 of the Laws of 1922, the compulsory contribution was changed to $500, a provision which is the subject of consideration in the case of *R. E. Sheehan Co. v. Shuler, as State Treasurer* (No. 593 of the October Term, 1923) to be argued herewith.

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the act in question may properly be characterized as unreasonable and fundamentally unjust.

POINT II.

The compulsory payment of $900, prescribed by the act under review, denies to the employer the equal protection of the laws, in contravention of the Fourteenth Amendment.

1. *Classification is not fairly made.*

It is only the employer whose deceased employee left no dependents that is singled out for involuntary contribution to the rehabilitation fund. Nothing but the fortuitous circumstance of absence of such dependents renders the employer liable to the exaction. Hence the palpable arbitrariness of the classification.

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."
>
> Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S., 150, 165.

Approving the reasoning of the Supreme Court of Kansas in *The State v. Haun* (61 Kansas, 146), this Court said: "So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual or even one set of individuals is selected from others doing the same business in the same way and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the constitution of Kansas and in that of the United States to the effect that the equal protection of the laws is guaranteed to all. * * *

This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

Cotting v. Kansas City Stock Yards Co.,
183 U. S., 79, 109, 112.

Closely parallel to the case at bar was one which involved the validity of a New Jersey statute, which provided that, where an employee came to his death as the result of an injury received in the course of his employment, but left no one entitled to compensation under the State Workmen's Compensation Act, the employer must pay $400 to the Commissioner of Labor, for transmission to the State Treasurer, the payment to be applicable towards defraying the expenses of the State Labor Bureau. Said the Supreme Court of New Jersey:

> "The real question is whether the state can, in view of the Fourteenth Amendment to the Federal Constitution, constitutionally tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accident. Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within section 2 of the Compensation Act, we reach a tenuity of classification that seems

to us to deprive the class of any logical validity and of all substantial basis. *Southern Railway Co. v. Green*, 216 U. S., 400. * * *. From another standpoint the act seems to be simply a taking of the property of this class of employers without any compensation therefor. They are in effect penalized for employing men or women who are without dependents qualified to claim compensation."

Bryant v. Lindsay, 110 Atl., 823, 824-5; aff'd. by the New Jersey Court of Errors (114 Atl., 447) on the Opinion of Mr. Justice PARKER in the Supreme Court.

2. *No mere regulation of the relation of employer and employee is involved.*

In sustaining the principle of compulsory Workmen's Compensation legislation, this Court, in the *White* case (243 U. S., 188, 201) and in the *Mountain Timber* case (243 U. S., 219, 236), dwelt upon the reciprocal advantages inuring to both employer and employee by the substitution, in the case of the employer, of a definite but limited liability for the uncertain hazards of a verdict, and by the substitution, in the case of the employee, of a moderate but ascertained compensation for the doubtful remedy of a law suit in which the common law defenses of assumption of risk, contributory negligence and negligence of a fellow servant were available. Here, however, in exchange for the liability imposed, this employer gains no relief from an action at law. For, under New York's adaptation of Lord Campbell's Act, recovery for death caused by wrongful act is given only for the benefit of surviving husband or wife and next-of-kin. (New York Decedent Estate Law, Art. 5, as enacted by Chapter 919 of the Laws of 1920.)

The Chief Justice observed in *Truax v. Corrigan* (257 U. S., 312, 339): It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so." Is it not even a more distant cry to classification based on the relation of an employer to those beneficiaries of the rehabilitation fund who, in the vast majority of instances, have never been in his employ?

In the Washington statute involved in the *Mountain Timber* case the principle of classification was observed to the extent of compelling an employer to contribute to the state fund only for the benefit of workmen of other employers engaged in the same class of occupation. (243 U. S., 219, 236-7, 241-2.)

POINT III.

The judgment under review should be reversed, and this cause should be remanded for further proceedings not inconsistent with the decision of this court.

All of which is respectfully submitted.

Dated, January 7, 1924.

ROBERT E. WHALEN,
Of Counsel for Plaintiff-in-Error.

APPENDIX "A."

THE WORKMEN'S COMPENSATION LAW.

Chapter 816 of the Laws of 1913, as amended and re-enacted by chapter 41 of the Laws of 1914, constituting chapter 67 of the Consolidated Laws, as amended.

ARTICLE 1.

SHORT TITLE; APPLICATION; DEFINITIONS.

Section 1. Short title.—This chapter shall be known as the "workmen's compensation law."

§ 2. Application.—Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction, repair and operation of railways not including group 1.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purpose of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

* * * * * * * * * *

§ 3. Definitions.—As used in this chapter, * * *

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein * * *

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.

10. "State fund" means the state insurance fund provided for in article 5 of this chapter * * *

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty * * *

ARTICLE 2.

Compensation.

* * * *

§ 10. Liability for compensation.—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the

injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter.

§ 11. Alternative remedy.—The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * * * * * * *

§ 14. Weekly wages basis of compensation.—Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as a basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the

accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings.

* * *

§ 15. Schedule in case of disability.—The following schedule of compensation is hereby established:

1. Total permanent disability. In case of total disability adjudged to be permanent, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of

such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character, but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of a first finger, commonly called the index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third fingers. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above

specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe. * * *

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe, or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange. * * *

Amputations. Amputations between the elbow and the wrist shall be considered as the equivalent of the loss

of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen of this chapter.

In case of an injury resulting in serious facial or head disfigurement the Commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars.

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest.

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not to exceed when combined with his decreased earnings the amount of wages he was receiving prior to the injury, and not to exceed in total the sum of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivision one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

7. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of

the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund and the Commission shall direct the distribution thereof.

8. Maintenance for employees undergoing vocational rehabilitation. An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state board of vocational education is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance; but such additional compensation shall not exceed ten dollars a week. The expense shall be paid out of special fund created in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of nine hundred dollars. The state treasurer shall be the custodian of this special fund and the industrial commission shall direct the distribution thereof. [*Subd.* 8 *added by L.* 1920, *ch.* 760.]

§ 16. Death benefits.—If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses not exceeding one hundred dollars.

2. If there be a surviving wife (or dependent husband), and no child of the deceased under the age of

eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The Commission may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement by the Commission the appointment of a guardian for such purposes shall not be necessary.

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving life (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If there be no surviving wife (or dependent husband) or child under the age of eighteen years or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent

upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until the age of eighteen years; and for the support of each parent, or grandparent, of the deceased, if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

* * * * * * * * * *

§ 20. Determination of claims for compensation.—At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the Commission as provided by this section, the claim may be presented to the Commission. The Commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The Commission shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation

is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the Commission. The Commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the Commission or a person specifically deputized by the Commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the Commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the Commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the Commission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The Commission shall examine such report and approve the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the Commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the employer under this section, the Commission may

impose a penalty of not more than ten per centum of the award.

* * * * * * * * * *

§ 21. Presumptions.—In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary:

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

§ 22. Modification of award.—Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such awards as regards any moneys already paid.

* * * * * * * * * *

§ 25. Compensation, how payable.—Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any

other period, as it may deem advisable. The state fund or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interest of justice.

* * * * * * * * * *

§ 27. Depositing future payments.—If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the commission may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the commission may deem necessary for a proportionate payment of expenses of administering the fund so created. The moneys so paid in for all death benefits or other compensation to constitute one aggregate and indivisible fund; and thereupon such employer or insurance carrier shall be discharged from any further liability under such award and payment of the same as provided by this chapter shall be assumed by the special

fund so created. All computations made by the commission shall be upon the basis of the survivorship annuitants' table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum.

ARTICLE 3.

Security for Compensation.

§ 50. Security for payment of compensation.—An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association and such information regarding the policies as the commission may require.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. * * * The commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of non-compliance to be recovered in an action brought by the commission.

* * * * * * * * * *

§ 52. Effect of failure to secure compensation.—Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

§ 53. Release from all liability.—An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

ARTICLE 4.

State Workmen's Compensation Commission.

§ 68. Technical rules of evidence or procedure not required.—The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry

or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

* * * * * * * * * *

§ 74. Jurisdiction of commission to be continuing.—The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just.

ARTICLE 5.

State Insurance Fund.

§ 90. Creation of state fund.—There is hereby created a fund to be known as "the state insurance fund," for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter.

§ 91. State treasurer custodian of fund.—The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers authorized by the commission and signed by any two members thereof. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor and with sureties

approved by the state comptroller conditioned for the faithful performance of his duty as custodian of the state fund. The state treasurer may deposit any portion of the state fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

§ 92. Surplus and reserves.—Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the commission for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the commission such surplus shall be sufficiently large to cover the catastrophe hazard. The commission shall also set up and maintain reserves adequate to meet anticipated losses and carry all claims and policies to maturity, which reserves shall be computed in accordance with such rules as shall be approved by the superintendent of insurance.

ARTICLE 6.

Miscellaneous Provisions.

§ 118. Unconstitutional provisions.—If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

APPENDIX "B."

THE REHABILITATION LAW.

§ 1200. Short title. This article shall be known and may be cited as "The Rehabilitation Law."

§ 1201. Definitions. As used in this article the terms:

1. "Physically handicapped person" shall mean any person who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury or disease, is or may be expected to be totally or partially incapacitated for remunerative occupation.

2. "Rehabilitation" shall mean the rendering of a person physically handicapped fit to engage in a remunerative occupation.

3. "Residing in the state of New York" shall mean any citizen of the United States or any person who has declared his intention of becoming a citizen who is and has been domiciled within the state for one year or more.

4. "Commission" shall mean the advisory commission for the rehabilitation of physically handicapped persons.

§ 1202. Limitation of article. This article shall not apply to:

1. Aged or helpless persons requiring permanent custodial care, or blind persons under the care of the state commission for the blind; or

2. Any person in any state institution or confined in any correctional or penal institution; or

3. Epileptic or feeble-minded persons or to any person who, in the judgment of the commissioner of education, may not be susceptible of rehabilitation; or

4. Persons of the age of fourteen years and under.

§ 1203. State advisory commission for the rehabilitation of handicapped persons. There is hereby created an advisory commission for the rehabilitation of physically handicapped persons, to be composed of the commissioner of education, who shall be chairman, or a member of the state industrial commission to be designated annually by the governor, and of the commissioner of health. Any member of the commission may designate an officer in his department to represent him on the commission and the acts of such officer shall be deemed to be the acts of the person who designated him. The commissioner of education shall designate the officer of the department of education charged with the administration of this act to act as secretary to the commission.

§ 1204. Power of commission. The commission shall have power:

1. To prepare a plan for co-operation between the industrial commission and the department of education which shall be submitted to the industrial commission and to the board of regents of the university.

2. To arrange any differences that may arise between departments charged with any duties under this act.

3. To arrange for such therapeutic treatment as may be necessary for the rehabilitation of any physically handicapped persons who have registered with the department of education, except persons who are entitled to such treatment under the workmen's compensation law.

4. To provide maintenance cost during actual training for physically handicapped persons registered for rehabilitation, except persons entitled to maintenance under the workmen's compensation law; provided, that when the payment of maintenance costs is authorized by the commission, it shall not exceed ten dollars per

week, and the period during which it is paid shall not exceed twenty weeks, unless an extension of time is granted by unanimous vote of the commission.

5. To arrange for co-operation between the bureau of employment of the department of labor and the department of education in securing employment for handicapped persons to the end that duplication be avoided.

6. To make all necessary rules and regulations for the purpose of carrying out this article which affect more than one department.

§ 1205. Duty of the industrial commission. The industrial commission shall:

1. Report to the department of education all reports made to it of cases of injuries received by employees which may result in rendering the person, in the judgment of the industrial commission, in need of rehabilitation.

2. Co-operate with the department of education in carrying out this article.

§ 1206. Duty of department of health. The department of health shall:

1. Arrange with all public private hospitals, clinics, and dispensaries and with practicing physicians to send to the department of education prompt and complete reports of any persons under treatment in such hospitals, clinics, or dispensaries, or by such physicians, for any injury or disease that may render them physically handicapped.

2. Arrange with health officers to send to the department of education prompt and complete reports of any persons who in the course of their official duties they find to be suffering from any injury or disease that may render them physically handicapped, if such persons have not already been reported.

3. Make physical examinations of any persons applying for or reported as needing rehabilitation, except persons reported by the industrial commission.

§1207. Application for rehabilitation. Any physically handicapped person residing within the state may apply to the department of education for advice and assistance regarding his rehabilitation.

§ 1208. Duty of the department of education. It shall be the duty of the department of education:

1. To provide that all persons reported to it or making application to it as physically handicapped shall be promptly visited by its representative who shall report upon their condition to the department, which shall then determine whether the person is susceptible of rehabilitation. Any person found susceptible shall be acquainted with the rehabilitation facilities offered by the state and the benefits of entering upon remunerative work at an early date. Any person who chooses to take advantage of the rehabilitation facilities shall be registered with the department and a record kept of every such person and the measures taken for his rehabilitation. The education department shall proffer to any such person counsel regarding the selection of a suitable vocation and an appropriate course of training, and shall initiate definite plans for beginning rehabilitation as soon as the physical condition of the person permits.

2. To arrange for special training courses in the public schools in the state, in selected occupations for physically handicapped persons.

3. To arrange with any private or commercial educational institution for training courses in selected occupations for physically handicapped persons.

4. To arrange with any public or private establishment or any employer for training courses in selected occupations of physically handicapped persons.

5. To arrange for social service for the visiting of physically handicapped persons and of their families in their homes during the period of treatment and training and after its completion, to give advice regarding any matter that may affect rehabilitation.

6. To aid physically handicapped persons in securing such employment as will facilitate their training or will be suitable to their condition.

7. To procure and furnish at cost to physically handicapped persons artificial limbs and other orthopedic and prosthetic appliances, to be paid for in installments, when such appliances cannot be otherwise provided. The proceeds of the sale thereof shall be paid to the treasurer of the state and shall be held by him in a special fund for the purposes of this subdivision. Payments from this fund shall be made at the direction of the commissioner of education.

8. To make surveys with the co-operation of the industrial commission and the department of health, to ascertain the number and conditions of physically handicapped persons within the state.

9. To make such studies as may be helpful for the operation of this act.

10. To co-operate with any department of the government of the state of New York or with any county or other municipal authorities within the state, or with any private agency, in the operation of this act.

§ 1209. Gifts and donations. The department is authorized to receive gifts and donations for the purpose of this article which may be offered unconditionally. All money received as gifts or donations shall

be paid to the state treasurer and shall constitute a special fund to be used under the direction of the department for the purpose of this act. A full report of all such gifts and donations, together with the names of the donors, the amounts contributed by each and all disbursements therefrom shall be submitted annually to the legislature as part of the report of the department.

§ 1210. Acceptance of law of the United States. The State of New York, through its legislative authority:

1. Accepts the provisions of any law of the United States making appropriation to be apportioned among the states for vocational rehabilitation of disabled persons;

2. Empowers and directs the board of regents of the university, hereby designated the New York state board for vocational education, to co-operate with such agency as the federal government shall designate to carry out the purposes of such law;

3. Appoints the state treasurer as custodian of all money given to the state by the United States under the authority of such law, and such money shall be paid out in the manner provided by such act for the purposes therein specified;

4. Authorizes the board of regents of the university as the state board for vocational education and the industrial commission to formulate a plan of co-operation in accordance with this act, which shall be effective when approved by the governor of the state. * * *

APPENDIX "C."

AMENDMENT TO THE CONSTITUTION OF THE STATE OF NEW YORK.

Article I, § 19. Workmen's compensation.—"Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees, or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Adopted by the people November 4, 1913; in effect January 1, 1914.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 103.

NEW YORK STATE RAILWAYS,
Plaintiff-in-Error,

vs.

GEORGE K. SHULER, as Treasurer of the State of New York, *et al.*,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

BRIEF OF DEFENDANTS-IN-ERROR.

CARL SHERMAN,
Attorney General.

E. C. AIKEN, Albany, N. Y.,
Counsel for Defendants-in-Error.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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No. 103.

NEW YORK STATE RAILWAYS,
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vs.

GEORGE K. SHULER, as Treasurer of the State of New York, *et al.*,
Defendants-in-Error.

Statement of the Case.

The defendants-in-error in this case have made their main brief in the case of R. E. Sheehan Company, Employer, and Aetna Life Insurance Company, Insurance Carrier, against George K. Shuler, as Treasurer of the State of New York, *et al.*, No. 593.

In the present brief which was prepared after seeing the brief of the plaintiff-in-error, I will simply advert to the points made in said brief.

(1) In Point I, the plaintiff-in-error says, "Neither loss nor destruction of earning power is involved", and he quotes from the case of New York Central Railroad Company v. White, 243 U. S. 188, among other things as follows:

> "The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." (P. 206.)

That is just what is involved with reference to the provision under consideration. The amount contributed by the employer and insurance carrier in the case of no dependents goes into the fund to be used as "compensation for human life or limb lost or disability incurred".

It is true that it does not follow the main trend of the Workmen's Compensation Law of New York, but adopts so far as that particular method of compensation the method used in the State of Washington of having a common fund from which to pay out compensation as managed by the state. It, therefore, has a direct bearing upon the loss and destruction of earning power in that the money is to be used for the rehabilitation of those who have lost their earning power, which the State is attempting to restore.

(2) The statute is a reasonable exercise of police power and is not arbitrary or oppressive. The same argument which the plaintiff-in-error makes was made against the Washington Act as a whole (Mountain Timber Company v. Washington, 243 U. S. 219) in which it was contended that employers might be compelled to contribute to a fund even if they had no employees injured by accident—that they, therefore, would be contribut-

ing to the compensation of the employees of another company—that the Legislature might thus enact a law which would be regarded as unreasonable and arbitrary. That the $1000.00 paid into a fund in case an employee is killed who has no dependents, we maintain is not unreasonable in amount inasmuch as the compensation for a single year for an employee who is killed as the result of an accident might run as high as $1000.00 for the single year.

(3) The classification involved no violation of the equal protection of the laws in that the employers and insurance carriers are all treated alike. It appears also that the Workmen's Compensation Law of New York under section 29 provides that,

> "In case of the payment of an award to the state treasurer in accordance with subdivisions nine and ten of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment of the deceased."

Respectfully submitted,

CARL SHERMAN,
Attorney General,
Attorney for State Industrial Board.

E. C. AIKEN,
Deputy Attorney General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

NEW YORK STATE RAILWAYS *v.* SHULER, AS TREASURER OF THE STATE OF NEW YORK, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 103. Argued January 9, 1924.—Decided May 26, 1924.

Decided on the authority of *Sheehan Co.* v. *Shuler, ante,* 371. 233 N. Y. 681, affirmed.

ERROR to a judgment affirming an award under the New York Workmen's Compensation Law. The judgment was entered in the Supreme Court of New York after affirmances by the Appellate Division and the Court of Appeals and remittitur of the record.

Mr. S. A. Murphy, with whom *Mr. Robert E. Whalen* was on the brief, for plaintiff in error.

The compulsory payment of $900, prescribed by the statute under review, deprives the employer, without fault, of its property, in contravention of the due process clause of the Fourteenth Amendment. *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Arizona Employers' Liability Cases,* 250 U. S. 400; *Ball* v. *Hunt & Sons, Ltd.,* [1912] A. C. 496; *New York Central R. R. Co.* v. *Bianc,* 250 U. S. 596; *Ward & Gow* v. *Krinsky,* 259 U. S. 503.

The statute is not a reasonable exercise of the police power. *New York Central R. R. Co.* v. *White, supra; Mountain Timber Co.* v. *Washington, supra.*

The employer's enforced contribution of $900 to the rehabilitation fund will compensate neither McNamara, who has died, nor dependents of his, who do not exist, for the loss of earning power. It can be fairly regarded as nothing else than a penalty imposed, not for the benefit of the injured employee or his dependents, but as a levy

made upon the employer in furtherance of the rehabilitation of such employees of other employers as have been incapacitated in the course of hazardous work. No less arbitrary and unreasonable would be an enactment requiring a building contractor, should a structure in course of erection by him collapse, without resultant injury or death, to contribute $900 to a rehabilitation fund.

The subject of judicial inquiry, in such a case as this, is whether the statute under consideration "is arbitrary and unreasonable, from the standpoint of natural justice," *White Case,* at p. 202; or "so extravagant or arbitrary as to constitute an abuse of power." *Mountain Timber Case,* at p. 237. Such was the test applied in determining the validity of the Arizona Act. 250 U. S. 421–422, 426. As recently as in *Cudahy Packing Co. v. Parramore,* 263 U. S. 418, this Court examined the question whether the liability prescribed by the Utah Workmen's Compensation Act was imposed unreasonably, capriciously and arbitrarily.

How unreasonable, capricious and arbitrary was the action of the New York legislature in fixing $900 as the amount of the contribution compelled by the statute under review is demonstrated by the circumstance that, when it came to a general revision of the Workmen's Compensation Law, by c. 615, Laws of 1922, the compulsory contribution was changed to $500, a provision which is the subject of consideration in *Sheehan Co. v. Shuler,* to be argued herewith. See *ante,* p. 371.

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the act in question may properly be characterized as unreasonable and fundamentally unjust.

The compulsory payment denies to the employer the equal protection of the laws, in contravention of the Fourteenth Amendment.

Classification is not fairly made. It is only the employer whose deceased employee left no dependents that is singled out for involuntary contribution to the rehabilitation fund. Nothing but the fortuitous circumstance of absence of such dependents renders the employer liable to the exaction. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *State* v. *Haun*, 61 Kans. 146; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Bryant* v. *Lindsay*, 94 N. J. L. 357; affd. 96 N. J. L. 268.

No mere regulation of the relation of employer and employee is involved.

In sustaining the principle of compulsory workmen's compensation legislation, this Court, in the *White Case, supra*, and in the *Mountain Timber Case, supra*, dwelt upon the reciprocal advantages inuring to both employer and employee by the substitution, in the case of the employer, of a definite but limited liability for the uncertain hazards of a verdict, and by the substitution, in the case of the employee, of a moderate but ascertained compensation for the doubtful remedy of a law suit in which the common-law defenses of assumption of risk, contributory negligence and negligence of a fellow servant were available. Here, however, in exchange for the liability imposed, this employer gains no relief from an action at law.

The Chief Justice observed in *Truax v. Corrigan*, 257 U. S. 312, 339: "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so." Is it not even a more distant cry to classification based on the relation of an employer to those beneficiaries of the rehabilitation fund who, in the vast majority of instances, have never been in his employ?

In the Washington statute involved in the *Mountain Timber Case* the principle of classification was observed to the extent of compelling an employer to contribute to the state fund only for the benefit of workmen of other employers engaged in the same class of occupation. 243 U. S. 219, 236–7, 241–2.

Mr. E. Clarence Aiken, Deputy Attorney General, with whom *Mr. Carl Sherman*, Attorney General of the State of New York, was on the brief, for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case, which was heard with *Sheehan Co.* v. *Shuler*, No. 593, just decided, *ante*, 371, likewise involves the question of the constitutionality of the amendment to the Workmen's Compensation Law of New York relating to the creation of a special fund for the maintenance of employees undergoing vocational rehabilitation.

The only difference between the two cases in this respect is that the present case arose under the Laws of 1920, c. 760, by which the amendment (then constituting subdivision 8 of § 15 of the Compensation Law), required the employer to pay the sum of nine hundred dollars to this special fund, while the *Sheehan Company Case* arose under the Laws of 1922, c. 615, by which the amendment (changed to subdivision 9) reduced the required payment to five hundred dollars.[1] The provisions are otherwise identical.

In March, 1921, an employee of the New York State Railways sustained, in the course of his employment, accidental injuries resulting in his death. He left no survivors entitled to compensation. The State Industrial Board, in an appropriate proceeding, awarded the State

[1] See the opinion in the *Sheehan Company Case*, note 6, *ante*, p. 375.

Treasurer against the Railways, a " self-insurer ", the sum of one hundred dollars, under subdivision 7 (now 8)[2] of § 15, for the total disability fund, and the sum of nine hundred dollars, under subdivision 8 (now 9), for the rehabilitation fund. The Railways did not appeal from the award under subdivision 7. On successive appeals the award under subdivision 8 was affirmed by the Appellate Division of the Supreme Court and the Court of Appeals, without opinions. 202 App. Div. 768; 233 N. Y. 681. The record was remitted to the Supreme Court, to which this writ of error was directed.

The Railways contend, as did the plaintiffs in error in the *Sheehan Company Case*, that subdivision 8 (now 9) of the Compensation Law and the award made thereunder, are in conflict with the due process and equal protection clauses of the Fourteenth Amendment.

This case is governed by the decision in the *Sheehan Company Case*. The difference in the amount of the required payment to the rehabilitation fund does not change the result. The amount required under the amendment of 1920 was neither unjust nor unreasonable. " The sum fixed in the statute is not great, is not larger than could readily be awarded, had the deceased left dependents. There is no evidence . . . that the sum fixed is so extravagant or arbitrary as to constitute an abuse of power." *Watkinson* v. *Hotel Pennsylvania*, 195 App. Div. 624, 627. And the aggregate of the required payments to the two special funds was then the same as that subsequently required under the amendments of 1922;

[2] This subdivision then required the employer, under the Laws of 1916, c. 622, to pay into the total disability fund, in the specified contingency, the sum of one hundred dollars; the amount being subsequently increased, under the Laws of 1922, c. 615, to five hundred dollars. See the opinion in the *Sheehan Company Case, supra*, note 4, *ante*, p. 373.

there being merely a different apportionment between the two funds.

The judgment of the Court of Appeals is

Affirmed.